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Terrorism, lawmaking and democratic politics: legislators as security actors

Abstract: Counterterrorist law is all too often made in a rushed, reactive and repetitious way, marginalizing the deliberative, critical and democratic functions of legislatures and leading to outcomes that later prove to be unconstitutional and counter-productive for public security. Using a political sociology approach, the article offers an analysis and theorisation of the practice of counterterrorist lawmaking. Through the UK example, the article argues that counterterrorist lawmaking compounds the existing unequal power relationships of the parliamentary field, and presents legislators with an inscrutable dilemma about the true stakes involved in legislative security politics.

Making new counterterrorist laws has become an internationally widespread response to terrorism. After 9/11, states the world over strengthened or enacted new counterterrorism legislation. The USA PATRIOT Act, expedited through congress with minimal scrutiny or opposition, attracted international concern for its civil liberties and human rights implications.ⁱ The UK government pushed draconian 'emergency' counterterrorist legislation through parliament within weeks of the event.ⁱⁱ Anglophone common law countries followed suit, drawing heavily on British legislation and jurisprudence.ⁱⁱⁱ In continental Europe, Germany, Norway, Belgium, Greece and Sweden all passed new laws.^{iv} This list is far from comprehensive. Some states enacted specific counterterrorism legislation for the first time. Others such as the UK, France and Turkey already had a long history in this area, reflecting historic internal political struggles. The UN Security Council helped foster this international legislative trend by unanimously adopting Resolution 1373 on 28 September 2001. This called on member states to create a range of counterterrorism measures, through legislation if necessary. At the same time it created a Counter-Terrorism Committee (CTC) with an executive directorate to monitor states' implementation of the resolution and the subsequent Resolution 1624 (2005).

Despite this trend, research on counterterrorism pays little attention to the role of legislature. Most focuses on government policy,^v the nature of security threats^{vi} or the letter and function of the law.^{vii} Indeed, there is no existing theory of security that takes the legislature seriously. The main debates about the control of terrorism and political violence in the last decade have followed a well-rehearsed argument in modern political thought from John Locke to Carl Schmitt that in times of emergency, executive prerogative prevails, suspending the law and marginalizing the legislature.^{viii} This existing framing cannot do analytical justice to the important role of legislators and legislative/executive power relations in counterterrorism. This article addresses this neglect.

Despite the impression given by some security analysts, the making of law is not simply a matter of executive decision.^{ix} Legislating is a practice embedded in the

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power relationships of a field of socially and politically situated actors. Government ministers, members of legislatures, civil servants and other public officials must negotiate public demands for action, political manoeuvres, unequal access to information, parliamentary and constitutional conventions, bureaucratic procedures and liberal democratic principles. This article focuses on the role of the legislature in the counterterrorist lawmaking process. However, understanding the entire empirical process of making law would require a focus on government policy making and the workings of the civil service, which is beyond the scope of this paper.^x

This article uses a political sociology framework derived from the work of Pierre Bourdieu in order to highlight the power relationships and embedded practices of counterterrorist lawmaking. The analysis focuses on the UK example, which because of its long history of counterterrorism offers a rich range of empirical sources such as several decades of debates, reviews, inquiries and committees on terrorism law. Analytically, this historical depth is important because it avoids the assumption that these issues are specific to a unique post-9/11 environment. Because states have such different histories, legal systems and constitutional arrangements, it is difficult to generalize from one state to all. As this paper will argue, the nature and character of counterterrorist lawmaking derives heavily from nationally specific historical, constitutional and institutional power structures. To move from a specific analysis to a generalized theory would run counter to this argument. Moving beyond the UK example would hence require extensive comparative work rather than generalization, which space does not permit. Nevertheless, it is hoped that the UK example and the theoretical framework offered can still shed light on the general issue of counterterrorist lawmaking and the role of legislatures as security actors.

Existing research and commentary in the UK shows that counterterrorist lawmaking is a highly problematic practice, all too often rushed, reactive and repetitious.^{xi} Laws are expedited at the behest of the executive, with legislative process radically shortened from a few months to a few days. Such laws proceed with overwhelming cross-party support. Every legal commentary on counterterrorist law makes the same observation: knee-jerk legislation is the inevitable legislative response to major terrorist attacks.^{xii} Parliamentarians themselves have recognized that instead of providing careful scrutiny of legislative proposals, discussing the nature of the threat and assessing the necessity and proportionality of the response, they are invariably swayed by the shock of events, acceding to executive demands and symbolic pressures for consensus and expedited legislative process.^{xiii} Yet legislative actors seem to forget all this the next time there is a perceived security emergency, when they repeat the same problematic practices. This undermines the scrutiny and oversight that are vital for effective and legitimate decision making in liberal democracies.^{xiv}

In addition to the *process* of counterterrorist lawmaking, its legal, social and security *outcomes* are also problematic. Counterterrorist laws frequently contain draconian and illiberal measures that are found by the courts to be unconstitutional or contrary to human rights laws, but only after several years of use. By this time they have often damaged community relations, liberal democratic legitimacy and, arguably, public

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security itself.^{xv} The problems of counterterrorist lawmaking are well known, but there is little in-depth analysis of how the practice works and why.

However, it is not as simple as arguing that counterterrorist lawmaking is an abuse of democratic process. In the UK system the constitutionally 'correct' way of making counterterrorist law is not clear. The UK's historically evolving 'unwritten' constitution means that nowhere is this codified. Rather, there are competing constitutional principles at work: on the one hand the historical principle of legislative (and judicial) deference to the executive on matters of security, but on the other hand the principle of parliamentary democracy, usually conceived in the UK as holding the executive to account through scrutiny and oversight (the concept of 'checks and balances' is not an explicit feature of the British constitutional landscape). Since the 1998 Human Rights Act, the defence of human rights has also become a constitutional principle and statutory duty, which is very much in tension with executive security prerogative. What is needed, therefore, is an understanding of these tensions and how they play out politically.

The UK example

In the UK, the problematic practice of counterterrorist lawmaking is historically institutionalized. It has been reproduced over generations of legislators and across profound changes in the security environment. The problem of rushed, reactive and repetitious security legislation goes back almost a century. New instalments of legislation are invariably enacted in response to terrorist events or similar.^{xvi} These laws are understood as temporary emergency measures, yet inevitably they become a permanent feature of the statute books.^{xvii} In occasional moments of self-reflection when some time has passed since the last major security event, parliamentarians recognize that security issues introduce unusual dynamics into the legislative process: parliament fails to learn lessons from the past and is swayed by the shock of terrorist events.^{xviii} In response to this and the changing security environment, British governments periodically instigate reviews of law and policy, which almost always result in making permanent, or 'normalizing', the patchwork of laws that were once considered as temporary and exceptional. I have analyzed the process of normalization in more detail elsewhere,^{xix} but suffice it to say here that the reason why such laws become normalized is because, despite a *discourse* of emergency, constitutionally there is no such thing as an 'exceptional' or temporary law. Any time-limited features of 'emergency' laws (e.g. 'sunset clauses') are only constructed *ad hoc* at the insistence of parliament. These can and do cause some counterterrorist powers to lapse in time, yet this does not change legislative power structures, doing little or nothing to affect the executive's ongoing dominance of the legislative process or any future political desire to create new laws that inevitably build on the last. This cycle of 'emergency' lawmaking begins anew the next time there is a major act of political violence.

Mark Neocleous and Laura Donohue have both documented this legislative history. This begins with the 1914-15 Defence of the Realm Acts, which became the 1920 Restoration of Order in Ireland Acts, which in turn became the 1922 Civil Authorities

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(Special Powers) Act or SPA.^{xx} Despite its supposedly temporary status the SPA was renewed annually for five years, then extended for another five years before being made permanent in 1933.^{xxi} The 1973 Northern Ireland (Emergency Provisions) Act built on the SPA, and despite its name and being originally limited to two years,^{xxii} it was added to with further Acts in 1978, 1987, 1991 and 1996.^{xxiii} At the same time parliament enacted the 1974 Prevention of Terrorism (Temporary Provisions) Act in response to the Guildford and Birmingham pub bombings, about which Roy Jenkins, the home secretary who introduced the Act, famously said, 'I would have been horrified to have been told at the time that it would still be law nearly two decades later'.^{xxiv} In evidence to the House of Lords, former Northern Ireland human rights commissioner Brice Dickson commented on the symptomatic problems of this legislation:

The [1974 Act], passed in the aftermath of the Guildford and Birmingham bombings, is a good example of Parliament acting in haste and repenting at leisure ... [it] was poorly drafted and hastily enacted. It did not, for example, take proper account of the requirements of the Convention on Human Rights... Later, of course, it transpired that the seven-day detention power under the Act was struck down by the European Court of Human Rights.^{xxv}

In the context of prospective peace in Northern Ireland in the mid-1990s, the then Conservative government commissioned an independent inquiry into the whole issue of terrorism legislation. The 'Lloyd Report',^{xxvi} as it became known, ultimately led to the carefully-considered Terrorism Act 2000, the aim of which was to 'modernise and streamline legislation on terrorism', provide 'a settled legislative framework',^{xxvii} and be 'sufficiently flexible to respond to a changing threat'.^{xxviii} This Act consolidated, normalized and made permanent the previous patchwork of 'provisional' counterterrorism laws. It was understood politically as an effort to put a stop to the recurrent problems of counterterrorist lawmaking, and though lauded as procedurally, politically and legally sensible, it is a solid demonstration of the argument put forward by both Neocleous and Donohue that 'exceptional', temporary or reactive emergency laws almost always become permanent.^{xxix}

Despite this lengthy review process, the long tradition of legislating for security in a rushed, reactive and repetitious manner was quickly revived. With the Terrorism Act 2000 having been on the statute books for a mere matter of months, the entire exercise was seemingly forgotten on 11 September 2001. The Anti-Terrorism, Crime and Security Act 2001 promptly followed, rushed through parliament as 'emergency' legislation, followed by four further counterterrorism or security laws.^{xxx} Many of these repeated the mistakes of counterterrorism in Northern Ireland. Two examples are, first, reintroducing a form of detention without trial (or 'internment') for terrorist 'suspects', a policy implicated in the 'radicalization' of the IRA and the alienation of communities;^{xxxi} and second, police powers to stop and search individuals without needing reasonable grounds for suspicion, recognized as leading to discriminatory practices against 'suspect' communities, which in turn breeds counter-productive resentment.^{xxxii} Both of these powers were subsequently ruled to be contrary to human

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rights laws, the first by the 'Law Lords' (the UK's highest court at the time),^{xxxiii} the second by the European Court of Human Rights.^{xxxiv}

In November 2005, the government was forced by its own backbenchers to make major concessions on its Terrorism Bill over the issue of extended pre-charge detention for 'terrorist suspects' (known as the '90 day' detention issue – note that in 1974 seven days detention was controversial and ultimately rejected by the courts). And in October 2008, after seven years of a relentless legislative programme on security following 9/11 and the 7/7 London bombings in 2005, the government suffered a high-profile defeat in the House of Lords over the provisions of its Counter-Terrorism Bill on the same issue.

After that, objections to whole legal counterterrorism edifice gathered momentum. Former home secretary Charles Clarke, responsible for introducing new counterterrorism laws when in office from 2004-2006, wrote in favour of a new legal consolidation,^{xxxv} while the parliamentary joint committee on human rights went much further in calling for an urgent 'review of the necessity and proportionality of all counter-terrorism laws passed since 2001'.^{xxxvi} Taken together, this represented a loss of enthusiasm in the legislature for further legislation.

When the new Conservative-Liberal Democrat coalition government took office in May 2010, it immediately announced an internal review of all counterterrorism laws and powers. The review proposed reducing or reforming some counterterrorist powers, such as replacing Control Orders with Terrorism Prevention and Investigation Measures and returning pre-charge police detention to 14 days.^{xxxvii} However, in 2011 the bills the government drafted to implement these changes proposed that any 'urgent situations' where stronger powers were 'considered necessary... would be catered for by the use of emergency legislation'.^{xxxviii} So even efforts at reform anticipate a repetition of the same problematic counterterrorist lawmaking practices.

Each time there is a terrorist event, security appears as a new and urgent problem to legislators. The response of legislating in a rushed, reactive and repetitive manner is well established and almost automatic. As Professor Anthony Bradley told the Lords Inquiry, 'it is only when there has been a new terrorist event of some magnitude that the next instalment of anti-terrorist legislation is passed, and I have no answer to the question why these further instalments should be necessary'.^{xxxix} And as Lord Lloyd, author of the 1996 'Inquiry into Terrorism Legislation', told the BBC in 2005,

the Terrorism Act of 2000...that came after about 30 years of Irish terrorism...was well thought out and it was comprehensive. And it was fair. That is the act we ought to be enforcing now instead of which, whenever a new terrorist event occurs, we start adding new things to that act. And that I think is a mistake. It started first immediately after the Omagh bombing and then it happened again after 9/11 in America and now it has happened again as a result of the terrorist activity of 7 July.^{xl}

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Although security problems appear new, the legislative response is not. Although the threats, suspect groups, governments and legislators themselves may change over the years, the same response is repeated. And although the content of new security laws may sometimes be innovative, the legislative process always suffers from the same problems of rushed, reactive and repetitious action.

The unequal power relations of parliament

Our starting point must be the structural observation that on the issue of terrorism, the legislature is heavily subordinated to the executive branch of government. By constitutional convention, it acts with cross-party consensus and defers to the security prerogative of the executive, which maintains a monopoly over the state intelligence and security apparatus. The unequal power relationship between the executive and legislature defines the nature and character of counterterrorist lawmaking. This relationship exists in 'normal' legislative politics but appears to be compounded in legislative security politics. Yet even in its relationship of subordination, the legislature plays a vital legitimating role that is central to lawmaking as a security practice. The legislature gives the law democratic legitimacy. At the same time however, counterterrorist lawmaking marginalizes the deliberative and critical functions of the legislature. Because of the convention of deference and consensus on tackling terrorism, this marginalization seems to happen through the passive assent of the legislature itself.

An unusual feature of the British constitutional system is the presence of the executive within the legislature. Unlike some other constitutional systems, notably that of the US, there is not a strict separation of the legislative and executive branches of government in the UK. The overlap of the executive and legislature within parliament means that in addition to the relationships between political parties and the upper and lower houses, parliament is also divided between those who are members of the executive (the Government) and those who are not. This means that to analyse parliament is not simply to analyse the legislative branch of government, but rather to examine executive-legislative relations.

Unequal power relations define the parliamentary field. The executive has command of the entire machinery of government with all the bureaucratic, informational and representations advantages that bestows, not to mention an electoral mandate. In contrast, membership of the legislature confers the possibility of invoking an alternative form of democratic capital against the dominant position of the government. Members of the Commons can speak from a position of democratic authority to scrutinize legislation, provide oversight of policies and hold the government to account. Members of the Lords lack democratic legitimacy but can often speak from a position of expertise from previous professional experience. The same is true of membership of a specialized parliamentary committee, which can speak with authority on a specific remit.

The legislature has little coercive power to exercise against the executive. Because it is dominated by party, the freedom of action of individual members is highly

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constrained. In the Commons, there are high costs for members who rebel against their party whips, especially for those who are also members of the government or potential members of a future government. There will be some who are happy to have a life in the political background in return for more independence, but for those motivated by a desire to influence policy, career advancement depends on patronage and promotion up the government and/or party ranks.^{xli} This is especially true in the British system, where parliament is the exclusive recruiting ground for members of present and future governments.^{xlii} So members of legislatures are again weak. They have the option of exercising some coercive power by rebelling and voting against their party on legislative proposals and other motions. This happens increasingly often,^{xliii} but it remains something of a blunt instrument with high political costs which is only to be used in extremis. Rebellions are more powerful when the government does not have an unassailable majority, as was the case in the third term of the last Labour government.^{xliv}

Despite these basic structural conditions, it is not enough to understand the parliamentary field in terms of a naked calculus of power. To do so would lead to a rather brief analysis and the conclusion that legislatures are simply irrelevant beyond the working majority of parliamentary votes they give the government. From here it would be simple to conclude that parliament is weak and poorly performs its function of holding the executive to account. Legislative members could be seen to act, in Max Weber's mocking terms, as little more than 'lobby fodder'.^{xlv} Flinders and Kelso argue that this view is 'highly dubious'.^{xlvi} Focusing on the outward structure of parliamentary power relations distracts from the importance of 'unobserved control mechanisms' such as backchannels between the executive and backbenchers, anticipated reactions and the role of internal party processes.^{xlvii} Moreover, they argue that the 'parliamentary decline thesis' – the orthodox view that parliament does not properly perform its constitutional role of holding the executive to account – is historically dubious and misunderstands the design of parliament as established in the constitutional reforms of the late 19th century.^{xlviii} Parliament, they argue, 'was designed and intended to play a largely acquiescent role in all but the most extreme circumstances', in order to facilitate a powerful executive that could get things done without being impeded by procedure, factionalism or vested interests.^{xlix}

The 'unobserved control mechanisms' of executive-legislative relations are methodologically quite difficult to discern, but the key point is that the most important functions and practices of parliament are not necessarily those which are overt. Although parliament was not designed to 'check and balance' executive power, that does not mean it is simply a 'rubberstamp' either. Even when appearing to act only passively and acquiescently, parliament performs a powerful legitimating function that is central to democratic government.ⁱ In a seminal study of the Brazilian parliament, Robert Packenham argued that the most important function of legislatures is a 'latent legitimation' derived from the mere fact of existing and meeting regularly.ⁱⁱ While the UK parliament does more than that, the significance of his study is that legislatures do not have to perform independently, overtly or even actively in the policy process to be vitally important to the legitimacy of government itself.

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More specifically for our analysis, lawmaking is a power the executive can mobilize only through the legitimizing recognition bestowed by the legislature. It is the executive that proposes new laws, but it is the legislature that enacts and gives assent to those laws.^{lii} This legitimation may not necessarily take an active form. For most individual members of legislatures most of the time, legitimation and recognition are conferred passively. But the importance of recognition is made visible when assent is withheld from individual bills in backbench rebellions or when governments lose votes of no confidence. At other times its workings can be analyzed in the backchannels of influence in executive-legislative relations.

These constitutional qualifications put the problems of counterterrorist lawmaking into starker relief. To legislate in an 'emergency' could certainly be construed as precisely the kind of 'extreme circumstance' in which parliament should play a more interventionist role. However, the historical record shows the opposite to be the case: post-terrorist attack lawmaking proceeds not just with strong government majorities, but with cross-party consensus. Although parliament does often insist on *ad hoc* safeguards such as sunset clauses and periodic reviews of counterterrorist powers, these are weak tools that do not alter the historical and ongoing institutionalisation of the practice of rushed, reactive and repetitious counterterrorist lawmaking. The legitimation and recognition bestowed by parliament is *more* forthcoming in this instance, not less. So while we should be realistic and well informed about the kind of role parliament can play in the legislative process, it is clear that there are complicating factors at work that are specific to security issues. In the next section we will examine these more closely.

The compounding effect of security on the parliamentary field

The issue of security compounds the unequal power relations of the parliamentary field. In many if not most countries, there is a constitutional convention that security is an area of executive prerogative. In the UK this is also manifested as a strong historical convention of cross-party consensus on counterterrorism, which means that terrorism is not a straightforward party political issue. This convention works against the overt politicization of security issues. Historically, this goes back to the sovereign right to declare war (which still exists in the UK as the 'Royal Prerogative', now vested in the Prime Minister).^{liii} In the UK, the legislature and judiciary have cited this convention as the reason for their deference to the executive on matters of security.^{liv} It is reinforced through capacity as much as propriety, since the judicial and legislative branches do not share access to executive intelligence and therefore lack the ability to authoritatively challenge assessments and assertions of threat. This has been construed by some parliamentarians as one of the central problems of counterterrorist lawmaking.

For example, a critical report by the joint committee on human rights in 2010 complained that parliamentarians suffer a lack of access 'to information about the scale and nature of the threat posed by terrorism in order to be able to make judgments about the necessity and proportionality of the responses'.^{lv} The problem is that the executive demand for the legislature to legislate on security issues is in

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tension with the executive prerogative to declare and counter threats on the basis of secret intelligence, for the legislature is called upon to act without the means to deliberate properly. In the UK system, the legislature is effectively expected to take the word of the executive on trust. At times of perceived emergency it always does, but it also has little choice. The complaint is that without access to intelligence, legislators 'do not have any way of testing the arguments'.^{lvi} The expedited nature of post-terrorist attack legislation compounds the problem. Whereas normal legislative process allows opportunities for scrutiny, deliberation and parliamentary evidence taking, when 'emergency' legislation is fast-tracked, these opportunities all but disappear.^{lvii}

Andrew Defty argues that the existence and work of the intelligence and security committee (ISC) – created by the Intelligence Services Act in 1994 - is slowly but imperfectly remedying parliament's lack of access to intelligence, with the turnover of ISC committee members meaning a small but growing number of senior parliamentarians have developed an expertise in this area, which in turn can improve the ability of parliament to exercise proper scrutiny and oversight.^{lviii} Defty argues that current and former members of the ISC can 'educate' the rest of parliament in the understanding and expertise necessary to authoritatively challenge government arguments that rest on intelligence claims, even if this has not happened effectively to date.^{lix} Before the late 1980s British governments officially denied the very existence of the security services, and opportunities for parliamentary scrutiny and oversight in the area of intelligence were non-existent.

However, the constitution of the ISC demonstrates the tensions that exist on this issue. The ISC is not a parliamentary committee, but rather an unusual 'committee of parliamentarians' who meet in secret and report to the prime minister rather than parliament. Its members are bound to the Official Secrets Act 1989. Despite this compromise between government secrecy and parliamentary accountability, the annual reports of the ISC have shone much light on the workings of the previously opaque activities of intelligence agencies. This, however, is executive oversight, not legislative scrutiny. As Defty points out, the ISC generally focuses on the "administration, policy and expenditure" of the intelligence and security services and only occasionally on operational matters.^{lx} It never comments on counterterrorist legislation, unlike, for example, the joint committee on human rights or the home affairs select committee.

An analysis of parliamentary intelligence access and expertise is only part of the picture, however. While lack of intelligence knowledge and expertise are certainly problems for the legislature in counterterrorist lawmaking, we also need to consider the special forms of recognition and legitimation at work on security issues which derive from, and are reinforced by, the historical sovereign security prerogative. The virtual monopoly of the executive on intelligence and the means of threat declaration combines to form a strong concentration of symbolic capital in the hands of the executive at the expense of the legislature. Williams explains that 'Capital comprises the resources that agents can draw upon to act in a given field',^{lxi} and in this sense intelligence is a powerful resource. It is not simply that the executive has all the

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information and the legislature has none. Rather, the executive monopoly over intelligence and security helps perpetuate, in a circular manner, the recognition of the executive as the legitimate authority on security.

The importance of recognition in the reproduction of parliamentary power relations emphasizes the sociological point that symbolic power works not simply through coercion and persuasion, but through inculcation. Bourdieu argues that in social, political and institutional settings, success often depends on actors internalizing the 'rules of the game': an implicit understanding of what is expected and reasonable and what would be deemed unacceptable or have other negative consequences. In legislative security politics, these rules seem to be expressed through certain habitual practices and expectations. The constitutional convention of deference to the executive is a central pillar of this, having an objective manifestation but also a subjective embodiment in the way parliamentarians expect and are expected to act on security matters. Bourdieu argues that conventions work as 'principles which generate and organize practices', creating 'a world of already realized ends - procedures to follow, paths to take...'.^{lxii} In the UK context, this is also frequently conveyed in the idea that after terrorist attacks, politicians must be seen to be doing something. For example, the 2009 Lords inquiry into fast-track legislation heard that 'very often in the aftermath of a terrorist atrocity, politicians must be seen to be doing something, and there is a public mood that demands that'.^{lxiii} Politicians seem to know how they are expected to respond to terrorist attacks, which suggests that responses to terrorism are historically institutionalized and manifested as convention.

The problems of counterterrorist lawmaking are structural, but also more than structural. In addition to the compounded power inequalities of the field, they seem to be embedded in the legitimating practices of parliamentarians themselves. Despite the fact that policy makers and legislators decry the problems of such legislation, they instinctively and habitually confer their democratic legitimacy on new laws presented by the executive the next time there is a major terrorist attack. Hence the power relationships of counterterrorist lawmaking do not simply consist of institutional, constitutional and political structures, but also apparent symbolic and mental structures, in the sense that making new laws has become part of the rules of the game and internalized as second nature to members of the legislature.

For Bourdieu, once invested in the game it is easier to go along with it than against it.^{lxiv} This favours a reproduction of practices and durable dispositions rather than their reflexive alteration, with implications for the continuation of existing power structures.^{lxv} As Bourdieu puts it, 'power often resides in the – entropic – choice not to do, not to choose', which chimes very much with the passive legitimating function of legislatures.^{lxvi} But furthermore, Bourdieu argues that actors come to exhibit shared dispositions, collective common senses, habitual ways of thinking and acting or not thinking and not acting: collective 'schemes of perception, thought and action'.^{lxvii} This is an effect of what he terms the *habitus*: inculcated mental structures that accompany the objective social structures of *fields*. *Habitus* shapes practices and shapes actors' understanding of their own practices. It gives actors a sense of why they do what they do, its importance, strategic direction and meaning.^{lxviii}

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Thus we might consider the legitimacy of new security legislation not to be constructed *ad hoc* around perceived new security threats as they arise, but in effect pre-constituted in the durable historical structures (constitutional, political and symbolic) of legislative security politics. Making new counterterrorist laws is a practice embedded in constitutional norms, shared mentalities and expected ways of responding to events. As Pouliot argues, 'practices are the result of inarticulate know-how that makes what is to be done self-evident or commonsensical'.^{lxxix} The practice of counterterrorist lawmaking is, in this sense, an effect of *field* and *habitus*.

Misrecognition

Given the degree to which legislators are instilled in the practice of counterterrorist lawmaking, it presents them with a dilemma about the stakes involved. The prevailing features of the practice are consensus and deference to the executive in the name of security. To provide security is arguably the *raison d'être* of the state,^{lxx} and security is a highly symbolic issue, particularly when it involves terrorist attacks.^{lxxi} Events such as 9/11 are not simply materially destructive, but are perceived and constructed as an attack on a nation, its values and its 'way of life'.^{lxxii} As Lord Lloyd notes in his 1996 report on terrorism legislation, terrorism is 'seen as an attack on society as a whole'.^{lxxiii} This is one reason for political consensus and the mantra that politicians must be seen to be doing something. From another angle, as securitization theory has long since stressed, the prerogative of defining the threat in order to claim the legitimate means to counter it is a characteristic feature of state power.^{lxxiv} In Bourdieusian terms, this is symbolic power: the 'power of making people see and believe, of predicting and prescribing, of making known and recognized'.^{lxxv} A few parliamentarians might try to contest this (to little effect), but in general, parliamentarians have a profound stake in this symbolic power and would not want to appear out of touch with the public mood.

But what the political sociology of Bourdieu adds to the equation is political struggle. There may be struggle over symbolic power, with competing representations of the threat and competing attempts to legitimize different means of dealing with it; in the parliamentary field of security politics this struggle is heavily stacked in favour of the executive, which in the wake of major acts of political violence is virtually assured recognition of its monopolistic symbolic position. Yet Bourdieu adds that struggle is always a *double game*: at once a symbolic struggle *and* a struggle for control of the objective apparatus of state: 'a struggle for power over the "public power" (state administration)'.^{lxxvi} The point is that political parties are, after all, struggling to win elections and secure control of government.

[P]olitical parties must on the one hand develop and impose a representation of the social world capable of obtaining the support of the greatest possible number of citizens, and on the other hand win positions (whether of power or not) capable of ensuring that they can wield power over those who grant that power to them.^{lxxvii}

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Following Bourdieu, we should consider whether in legislative security politics the stakes are doubled: publically, to provide security or at least to demonstrate a symbolic monopoly over security representation, but also to win or hold objective political power. This presents members of the legislature with a dilemma. The universally avowed concern for public security and the conventions of consensus and deference in which it takes part may in fact conceal a partisan political struggle.^{lxxviii} How do parliamentarians know that the executive really does know the nature of the threat, and is not merely asserting so for opportunistic political advantage? How do legislators know if security really is at stake, or whether the struggle is in fact party political? How do they know if legislative security politics is being practiced in good faith or bad? Again the problem is one of knowledge, but also of recognition and a heavily stacked terrain of contestation.

While there is plenty of information on the security situation in the public domain that parliamentarians could deploy in the symbolic struggle, this is not comparable to the specific intelligence claims that governments use to justify their legislation, policies and actions. While legislators may have access to other sources of knowledge such as the work of security experts, and a few may have an inside view through their membership of the ISC, the enduring structures of recognition of the sovereign security prerogative mean that the executive will always be in a position to make the strongest claim to authority. Whether or not the executive has genuine knowledge of the threat, what matters is the *recognition* of its security authority, which is deeply institutionalized. This is the dilemma faced by legislators: the recognition and legitimation they bestow may be unfounded. It may be what Bourdieu terms *misrecognition*.^{lxxix} There is always an opportunity for the executive to abuse the deference accorded to it for political reasons, but the legislature has little ability to authoritatively challenge it or know what is truly at stake.

These unequal constitutional and symbolic power structures seem to be self-perpetuating, reproduced not simply by the practices of the executive in good faith or bad, but by the embedded recognition and legitimation passively performed by parliamentarians. Arguably, misrecognition and the potentially concealed, doubled nature of the symbolic and political struggle are central but inscrutable features of counterterrorist lawmaking and security politics more generally. In this final part of this section we will look at three examples of this, where the executive jealously asserts its security prerogatives even when the evidential grounds for doing so prove to be flimsy and/or partisan.

In a rare public lecture in 2009, Jonathan Evans, the Director General of the Security Service (MI5), said:

After 9/11 the UK and other western countries were faced with the fact that the terrorist threat posed by Al Qaida was indiscriminate, global and massive. Now, 8 years on, we have a better understanding of the nature and scope of Al Qaida's capabilities *but we did not have that understanding in the period immediately after 9/11* [emphasis added].^{lxxx}

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This demonstrates the problem that on some security issues, especially when they appear new, the executive may know the nature of the threat no better than anyone else, but nevertheless asserts and receives the authority to declare, define and respond to it. As we have heard, lack of access to intelligence has been a constant source of complaint from parliament's joint committee on human rights; a complaint compounded by the fact that Evans gave this public lecture at all, despite constantly refusing 'to give evidence to any parliamentary committee other than in private to the intelligence and security committee'.^{lxxxix}

Let us consider another example of the *double game* of security politics and the potential for misrecognition and political abuse. Governments are extremely sensitive about revealing their intelligence and its sources. This is often claimed to be for operational reasons, since informants, agents and officers in sensitive or dangerous positions could be compromised, at the same time revealing important details of intelligence gathering capacity, techniques and strategy, and undermining sensitive intelligence sharing relationships between governments, some of which may be rather unsavoury.

This intelligence sharing argument was used by David Miliband when Foreign Secretary in early 2010.^{lxxxix} He ordered the partial redaction of a judicial ruling on the case of UK resident Binyam Mohamed, who, when under detention at the behest of the US government, was tortured by the Pakistani intelligence service.^{lxxxiii} The information in the ruling was a CIA summary of Mohamed's mistreatment by Pakistani intelligence that was sent to British intelligence in 2002, thus demonstrating British collusion. The Court of Appeal subsequently rejected the Foreign Secretary's argument and forced the publication of the redacted paragraphs.^{lxxxiv} Miliband's argument was one of national security, but lack of disclosure offers governments an opportunity to spin, manipulate, suppress or even fabricate intelligence, which is then extremely difficult for legislators (and indeed the judiciary and the public) to challenge authoritatively. Critics of Miliband suggested that the executive prerogative of secrecy was not being used to protect national security, but to prevent embarrassment to the government and avoid giving succour to political opponents rather than to 'terrorists'.^{lxxxv}

A final example: in the UK and US the executive has the ability not merely to declare threats or even a full-scale state of emergency (something of a blunt instrument which may strain credibility in the absence of an obvious and visible threat^{lxxxvi}), but to set and modulate an official 'threat level'. Both governments have created institutionalized systems for this,^{lxxxvii} which have come under both serious and satirical criticism for the apparent meaninglessness of, for example, raising the threat level from 'substantial' to 'severe' in the absence of any other public information.^{lxxxviii} The fear is that this kind of system presents the executive with an opportunity to manipulate the threat level for political advantage. Whether changes in the threat level are 'true' or not is almost impossible to verify without access to intelligence. Nevertheless executives almost always receive the benefit of the doubt from the other branches of government because they lack the symbolic capital to do otherwise.

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In the UK, the government tried to quell doubts about political manipulation of the threat level by having an intelligence unit - the Joint Terrorism Analysis Centre or JTAC - set the threat level. In 2010 this became the subject of controversy in parliament because of the lack of an apparent link between the official 'threat level' and the government's ongoing assertion that there is a 'public emergency threatening the life of the nation'. This assertion has legal significance because it formed the admissible basis for the UK's derogation from Article 5 of the European Convention on Human Rights in 2001, which facilitated the policy of detention without trial of foreign 'terrorist suspects' contained in the post-9/11 Anti-terrorism, Crime and Security Act 2001. Although this policy was eventually declared incompatible with the Human Rights Act by the courts,^{lxxxix} the government did not drop the assertion, and neither has it been repudiated by the subsequent Conservative-Liberal Democrat government. In written evidence to the joint committee on human rights in early 2010, a security minister suggested that the (Labour) government would not necessarily drop the assertion 'even if the threat level as assessed by JTAC was at "moderate" or "low"'.^{xc} In its subsequent report, the JCHR expressed concern that, 'the Government's approach means that in effect there is a permanent state of emergency, and that this inevitably has a deleterious effect on public debate about the justification for counter-terrorism measures'.^{xc} This demonstrates the *double game* of parliamentary security politics. Despite political gestures towards the depoliticization of intelligence, the government cannot but assert its secret intelligence prerogative. This has a direct effect of symbolic violence on public and indeed parliamentary debate on counterterrorism.

Conclusions: the possibility of democracy?

The conclusions to be drawn from this analysis of legislative security politics come close to those to be drawn from existing critical theories of security, but with some important departures. Its emphasis on the symbolic domination of the executive supports, to an extent, the dramatic claims about sovereign exceptionalism in the literature inspired by Carl Schmitt and Giorgio Agamben.^{xcii} The same could be said of the 'elitist' claims of securitization theory,^{xciii} particularly its posited relationship between 'speaker' and 'audience', which could be mapped onto executive-legislative relations.^{xciv} However, the conclusions to be drawn from this article differ in three important respects due to the specificities of the subject matter and the theoretical approach. The implications are political and methodological.

First, deploying the sociological approach of Bourdieu enables an analysis of *how* these 'sovereign' capacities work. Executive security prerogative is not simply a *de facto* condition of sovereign/state power,^{xcv} but rather is historically embedded in the institutional, social and mental structures of the wider parliamentary field. This field is defined by an unequal power relationship that involves domination and dispossession on the part of the executive but also legitimating recognition and passivity on the part of the legislature. This is not simply a discursive speaker/audience relationship but a *power* relationship. It exists in 'normal' legislative

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politics but is compounded in legislative security politics. Legislative security politics is therefore not exceptional, as per the critical debates, but perhaps *hyper*-normal.

Second, by analysing legislative security politics as a *double game*, we can see that security politics is not only about *security* but also about *politics*. This point is surprisingly absent in other literatures. Security may well be a problem to be solved or a discourse to be constructed and contested, but potentially it is also a concealed weapon in ongoing political struggles where the stake is not only security but also politics. The point is not simply that security politics can be practiced in good faith or bad, but rather that the legislative participants would have trouble to know the difference, given their compounded position of dispossession and their embedded (potential) misrecognition of the nature of the struggle.

Third and finally, despite the problems inherent in the *field* and *habitus* of counterterrorist lawmaking, and despite the apparent pessimism contained in the above analysis, Bourdieu's political sociology is built on the possibility of a more critical and less elitist democracy in a way that other forms of security analysis are not. Despite Bourdieu's emphasis on durable dispositions, naturalized assumptions and embodied power structures, the possibility for democratic actors to recognize hitherto unquestioned problems and potentially move beyond them is central to Bourdieu's wider project.^{xcvi} As Topper explains:

Bourdieu's efforts to identify the precise ways in which contingent social norms, practices, and structures become "naturalized" is intended to open new spaces of political agency and resistance, to liberate social and political actors by enabling them to shape and act upon those forces that previously shaped and acted upon them, and to facilitate interventions in those chains of causality that restrict the development of more vital democratic institutions and practices.^{xcvii}

While we should not underestimate the enduring power structures of the parliamentary *field* and *habitus*, Bourdieu holds out the possibility, however weak, that actors could stop to examine their practice and mentality, question and recognize their problematic nature, denaturalize the structures that foster misrecognition, and potentially determine to do things differently. Parliament is a rather unfashionable place to vest one's faint hopes for a more critical and democratic form of security politics. Perhaps then it is fitting to end with a parliamentary quote by a perversely apposite speaker: 'If it is, on occasions, the place of low skulduggery, it is more often the place for the pursuit of noble causes.'^{xcviii} Perhaps not more often, but maybe one day.

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